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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

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THE PEOPLE,

Plaintiff and Respondent,

v.

ORLANDO DEHAVEN COLLINS,

Defendant and Appellant.

C065836

(Super. Ct. No.  
084280)

Defendant Orlando Dehaven Collins pled no contest to second degree burglary (Pen. Code, § 459)<sup>1</sup> and was placed on probation in Yolo County. He later pled no contest to petty theft with a prior theft-related conviction in Stanislaus County. (§ 666.) After his probation was revoked in Yolo County, defendant was sentenced to consecutive state prison sentences.

On appeal, defendant seeks additional conduct credits related to the Stanislaus County case. For the reasons we shall

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

discuss, we modify defendant's sentence, subtracting (not adding) conduct credits previously awarded. We order that the abstract be modified, and otherwise affirm the judgment.

### **PROCEDURAL HISTORY<sup>2</sup>**

In October 2008, defendant was convicted of second degree burglary in Yolo County case No. 084280. The trial court sentenced defendant to three years in state prison, but suspended execution of that sentence and placed defendant on probation for three years.

In October 2009, defendant was convicted of petty theft with a prior theft-related conviction in Stanislaus County case No. 1407783. Defendant was sentenced to two years in state prison with 85 days' presentence credit, consisting of 57 days' actual custody credit and 28 days' conduct credit.

The trial court in Yolo County subsequently found defendant violated his probation in Yolo County case No. 084280. On February 22, 2010, the trial court sentenced defendant to state prison in the Yolo County case and resentenced defendant in the Stanislaus County case pursuant to section 1170.1, subdivision (a) and rule 4.452 of the California Rules of Court. The trial court executed the previously stayed three-year term in the Yolo County case, designated that term as the principal term, and imposed a consecutive eight-month term for the Stanislaus County conviction. Applying the January 2010

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<sup>2</sup> We dispense with the facts of defendant's crime, which are unnecessary to the resolution of this appeal.

amendments to section 4019, the trial court awarded 161 days' presentence credit in case No. 084280, consisting of 81 days' actual custody credit and 80 days' conduct credit. However, the Yolo County credits are not reflected in the abstract of judgment.

Defendant subsequently moved for additional presentence credit in the Stanislaus County case. The Yolo County trial court denied defendant's motion and confirmed the 85 days' presentence credit previously awarded in Stanislaus County.

## **DISCUSSION**

### **I. Retroactivity of Penal Code Section 4019 Conduct Credits**

Prior to January 25, 2010, a defendant was entitled to two days of conduct credit for every four days of presentence custody. (Former § 4019.) In October 2009, the Legislature amended section 4019 to award four days of conduct credit for every four days in custody. The amendment became effective on January 25, 2010. (Stats. 2009, 3d Ex. Sess., ch. 28, § 50.)

Following defendant's conviction for petty theft with a prior, the Stanislaus County Superior Court awarded defendant 85 days' presentence credit, consisting of 57 days' actual credit and 28 days' conduct credit. When defendant was sentenced on the Yolo County conviction and resentenced on his Stanislaus County conviction, he asked the trial court to modify the award of credits in the Stanislaus County conviction to reflect the amendments to section 4019. The trial court denied the motion, finding it lacked the authority to modify the Stanislaus County Superior Court's award of credits. Applying

the January 2010 amendments, the trial court awarded defendant 81 days' actual credit and 80 days' conduct credit in the Yolo County case.

Defendant asserts he is entitled to the additional conduct credit from the January 2010 amendments. He argues that the trial court imposed a new sentence when it recalculated the sentence in the Stanislaus County case under section 1170.1, subdivision (a). According to defendant, this new sentence gave the trial court the authority to apply the January 2010 amendments. He concludes that the trial court's failure to award credits under the new law violated his due process rights. The Attorney General argues in reply that amendments to the calculation of conduct credits do not apply retroactively, and therefore should not have been applied to the credits for the presentence time in either the Stanislaus County case or the Yolo county case.

After the conclusion of briefing, the California Supreme Court addressed the retroactivity of the January 25, 2010 amendments in *People v. Brown* (2012) 54 Cal.4th 314, holding that the amendments "applied prospectively, meaning that qualified prisoners in local custody first became eligible to earn credit for good behavior at the increased rate beginning on the statute's operative date." (*Id.* at p. 318.)

Defendant was sentenced in Stanislaus County on October 29, 2009. Since his presentence incarceration occurred before January 25, 2010, he was not eligible for any additional credits.

The same analysis applies to defendant's custody credits in the Yolo County case. Defendant was awarded 81 days' actual custody credit and 80 days' conduct credit in the Yolo County case based on presentence custody from August 7, 2008 to October 26, 2008.<sup>3</sup> This award cannot stand after *Brown*. Since defendant was awarded credits for presentence custody before January 25, 2010, his conduct credits must be calculated under the old law.<sup>4</sup> Accordingly, the abstract must be modified to reflect an award of 40 days' conduct credit rather than the 80 days previously awarded.

## **II. Modification of Abstract**

There is an error in the abstract of judgment. The abstract does not reflect the award of credits in the Yolo County case. The trial court is directed to correct the abstract reflecting this award of credits, as modified by this opinion. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 386.)

## **DISPOSITION**

The award of conduct credits in Yolo County case No. 084280 is modified to 40 days, for a total of 121 days' presentence

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<sup>3</sup> Defendant was also in custody in Yolo County from February 8, 2010 to February 22, 2010, but was awarded no presentence credit, as he was serving a state prison sentence at the time.

<sup>4</sup> Accordingly, it is unnecessary to reach the legal issue of apparent first impression raised on appeal as to whether the Yolo County trial court had the authority to recalculate the conduct credits awarded in the Stanislaus County case upon resentencing under Penal Code section 1170.1, subdivision (a) and rule 4.452 of the California Rules of Court.

credit. As modified, the judgment is affirmed. The trial court is directed to prepare a modified abstract of judgment that reflects 81 days' actual custody credit and 40 days' conduct credit in Yolo County case No. 084280 and includes the award of 57 days' actual credit and 27 days' conduct credit in Stanislaus County case No. 1407783, and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

\_\_\_\_\_, MURRAY, J.

We concur:

\_\_\_\_\_, HULL, Acting P. J.

\_\_\_\_\_, ROBIE, J.